IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 17 of 1993

with

CRIMINAL APPEAL No 20 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? yes

2. To be referred to the Reporter or not? yes

3. Whether Their Lordships wish to see the fair copy of the judgement? no

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? no

5. Whether it is to be circulated to the Civil Judge?

no

DINESH KUMAR BECHARBHAI GAMETI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 17 of 1993
MR BA SURTI for Petitioners
MR B.D.DESAI,ADDL.PUBLIC PROSECUTOR for Respondent No. 1

2. Criminal AppealNo 20 of 1993
MR B.D.DESAI,ADDL.PUBLIC PROSECUTOR for Petitioners
MR B.A.SURTI,for RespondentS

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

Date of decision: 06/08/98

ORAL JUDGEMENT Per Bhatt,J.

Both these appeals arise out of one and common judgment and order.Criminal appeal No. 17 of 1993 which is hereinafter referred to as appeal No.1 is filed by the original accused persons ; whereas criminal appeal No.20 of 1993 ,which is hereinafter referred to as appeal No.2 is filed by the State for enhancement. Therefore, they are being disposed of by this common judgment.

Shortly stated, the material and relevant facts of the present case are the appellants of appeal No.,1 are the original accused persons and respondent is the State of Gujarat; whereas, respondents in appeal No.2 are original accused persons who are hereinafter referred to as accused Nos.1 and 2, for the sake of convenience and brevity.

The accused persons were sent up for trial, before the sessions court ,Sabarkantha at Himatnagar in sessions case No. 34 of 1992 for offences under sections 302 read with section 34, I.P.C and section 135 of the Bombay Police Act,1951.,in that, it was alleged that on 18.3.1992 at about 11.15 p.m. deceased Popat Dhulaji who was standing alongwith others near Holi fire, at that time, one boy told him that they are called by the accused persons.Therefore, the deceased went to the place known as Intwada (brickyard) and there, accused No.2 caught hold of the deceased and accused No.1 inflicted a knife blow from the back portion of the deceased which culminated into death of Popat Dhulaji. It was the prosecution case that both the accused persons had formed a common intention to commit intentional murder of the deceased on account of the fact the deceased had scolded and rebuked accused No.2 Jagdish for keeping illicit relationship with one school girl Gita. The incident just occurred near the Holi fire on Holi day in village Piplodi, of Vijaynagar taluka of Sabarkantha district.

The accused pleaded not guilty. Therefore, prosecution in support of the charge, relied on the following 11 prosecution witnesses:

P.W. No.1 JivajiRupaji, Exh. 7
" 2 Harjibhai Bhuraji 9
" 3 Arvindbhai Jivaji 10
"` 4 Kishorji Jivaji 11
" 5 Dhulaji Martaji 12
" 6 Gitaben Martaji 13

" 7 Narendrakumar Somaji 14
"` 8 Arvindbhai Martaji 18
" 9 Bahecharbhai Lalabhai 19
" 10 Babubhai Laljibhai 22
" 11 Natverlal Sankalchand 27

The prosecution also placed reliance on documentary evidence of post mortem report, complaint and report of forensic science laboratory to which reference will be made in the course of judgment ,as and when required.

The trial court upon assessment of the evidence and evaluation of the facts and circumstances, found the accused persons guilty for the offence under section 302. The trial court also held that both the accused persons had entertained a common intention to murder the deceased and in pursuance thereof, murder was committed. The deceased died homicidal death amounting to murder as held by the trial court after holding guilty for the offence punishable under section 302 and also observing that minimum punishment is imprisonment for life under section 302. However, considering the peculiar facts and circumstances, the trial court sentenced the accused for ten years R.I. The trial court also found that the accused persons are found guilt for offence under section 302 read with section 34 and one one came to be sentenced for R.I. for ten years and fine of Rs. 200/-,in default, to undergo further imprisonment for seven days. Accused No.1 was also held guilty for offence punishable under section 135 of the Bombay Police Act,1951 and sentenced accused No.1 to a fine of Rs. 100/-, in default, to undergo further four days' imprisonment,by the impugned judgment and order recorded by the learned Additional Sessions Judge, on 23.9.1991.

The accused persons have,therefore, filed appeal No.1 under section 374 of the Code of Criminal Procedure, 1973 ; whereas, the State has filed appeal No.2 under sections 377 and 378 of the Code for enhancement of sentence.

After having heard dispassionately the learned advocate for the accused persons and the learned Additional PP and after having examined the entire testimonial collections and documents and the impugned judgment, we have no even the slightest hesitation in finding that appeal No.1 at the instance of the accused persons is meritless ;whereas appeal No.2 filed by the State for enhancement and against acquittal is quite justified for the reasons which we hasten to refer hereinafter.

The prosecution placed reliance on the following three

eye witnesses :

P.W.2 Harjibhai Bhuraji, Exh. 9
P.W.3 Arvindbhai Jivaji, Exh. 10 and
P.W.4 Kishorji Jivaji, Exh. 11

The evidence of all the three eye witnesses fully supports the prosecution case. The following aspects have emerged from their testimony:

(i) the accused persons who are relatives had called the deceased Popat when he was witnessing Holi fire at about 11.15 p.m. on 18.3.1992;

(ii) five persons and the deceased were standing near the Holi fire . At that time, a young boy asked deceased Popat to go little farther towards brickyard;

(iii) original accused No.1 and 2 were present when the deceased reached near them. At that time, accused No.2 Jagdish caught hands of the deceased and thereafter accused No.1 Dinesh inflicted a knife blow from back portion of the deceased which caused serious injuries to the deceased and proved fatal;

(iv) it is amply clear from their evidence that there was illicit relationship between accused No.,2 Jagdish and Gita.Therefore, the accused persons who are relatives were rebuked by the deceased. There was also hot exchange of words.

It becomes clear from the testimony of all the three eye witnesses who are relatives of the deceased that the authors of the crime were the accused persons. Their evidence radiate an imprint of truth. Simply because they are related to the deceased, it cannot be said that relationship with the deceased is discreditable factor and therefore,their evidence should be discredited. On the contrary, according to settled proposition of law, close relatives would not be interested in planting or manipulating innocent persons in place of real offender or culprit. Their main anxiety would be to see that real offenders are brought to book.It is not interestedness nor relationship that matters but the reliability and creditability only that matters. After having given our anxious thought to the testimony of all the three eye witnesses, we are satisfied that the trial court has rightly placed reliance on their evidence as they are truthful witnesses and their presence at the scene of

offence on the auspicious day of Holi was quite natural.Therefore, the criticism that the three eye witnesses are relatives of the deceased and they should not be believed because of their relationship with the deceased cannot be sustained. Again, some contradictions and discrepancies are pointed out by the learned advocate Mr.Surti for the accused. In our opinion, these discrepancies and contradictions are not in any way sufficient to discredit the entire evidence of all the three eye witnesses.

The evidence of eye witnesses is fully reinforced by the complaint produced at Exh.. 8. It cannot be said that it was lodged late. The incident occurred on 18.3.1992 and the complaint came to be lodged on the next date on 19.3.1992 but the incident as such had occurred around 11.15 p.m. (midnight) and the complainant who is the uncle of the deceased had lodged the complaint without loss of time. Initially, the deceased was taken to Vijaynagar in a jeep.Unfortunately, the deceased succumbed to the fatal injuries sustained by him en-route. Therefore, the complainant and other persons who was carrying the dead body first went to Vijaynagar police station and lodged the complaint and thereafter the dead body was shifted to the civil hospital. The evidence of the complainant who is an eye witness has also remained totally unimpeachable.

The evidence of the three eye witnesses is also fully reinforced by the medical evidence . Dr Narendra Somaji who was working as medical officer in Vijaynagar community health centre had conducted the autopsy at 10a.m. on 19.3.1992. The post mortem report is produced at ex. 16.According to the medical evidence of Dr. Narendra Somaji and post mortem report, the following external and internal injuries were found on the person of the deceased :

External injuries:

Transverse stab wound on 6th inter-costal space on the posterior aspect of left side of chest, 3 cm.away from midline inwardly directed 3 cm x 2 cm..

Internal injuries:

(i) Liquid blood present on the left side of the chest.

(ii)Wound described in column No.17 penetrated the left side of the pleura,left inferior to be of the lung reaching the medial surface of the left lung and pierced

the left ventricle: Wound size:

(1) 5 cmx 1 cm on posterior surface of the lung;

(2) 2 cm x 1 cm on medial surface of the lung.

(3) 1.5 cm x 1 cm on the left ventricle.

It is clearly testified by Dr Narendra that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death and they were possible by any sharp cutting instrument like knife, Art.No.11.The muddamal article No.11-knife- is 23 cm.in length having blade portion of 11.5 cm. The blow of knife given by accused No.1 Dinesh on the deceased who was caught hold of by accused No.2 Jagdish was so forceful ,was so powerful that it entered from the back of the deceased and pierced through and through and cut the chamber of the heart.

The prosecution case and the evidence of the eye witnesses has been fully reinforced by the medical evidence.

It is also found from the record that muddamal knife,Art. No.11 was discovered by accused No.1 Dinesh in presence of the Panchas which contained blood marks of the group of the deceased who had blood group of A-B. It is also supported by report of forensic science laboratory., Thus,discovery panchnmama produced at Ex. 31 is relevant under section 27 of the Evidence Act.

Panch witness Natverlal Sankalchand has clearly supported the prosecution case and in his evidence, discovery panchnama exh. 31 is proved. According to the provisions of section 27 of the Evidence Act, discovery or recovery of incriminating blood stained weapon becomes relevant not because of discovery at the instance of the accused person concerned but the element of criminology tending to connect the accused with the crime lies in the authorship of concealment. So, it was accused No.1 Dinesh who had concealed the incriminating crime weapon -knife- muddamal Art. No.11. Accused No.1 Dinesh gave information leading to the discovery and he was the person who had concealed it. The prosecution has proved that the said Muddamal Art. No.11 was tainted with human blood group A-B and it is also fully reinforced by forensic science laboratory report at Exh. 44 and 45.

It will also be material and interesting to mention at this stage that deceased Popat ,after infliction of knife

blow made statements before the eye witnesses and the persons present on spot near the venue of offence involving both the accused persons and also the motive ascribed by the prosecution to the commission of crime. Oral dying declarations before the eye witnesses are noticed by us to be spontaneous and voluntary representing truthful version of the incident. Conviction can also be founded upon the sole evidence of dying declaration if it is shown to the satisfaction of the court that it was made by the deceased uninfluenced by any extraneous circumstances or prompting and it was the exact version of the deceased which was truthful; whereas in the present case, there is consistent evidence of three eye witnesses and P.W. No.8 Arvindbhai Martaji Ex.18 that immediately after infliction of the knife blow given by accused No.1 Dinesh and despite profuse bleeding, deceased Popat in clear terms made oral dying declarations that accused No.2 Jagdish was abusing Gita and in that connection, he had rebuked him and therefore,to take revenge, he is assaulted. P.W. Arvindbhai reached the venue of offence after infliction of the knife blow.He is the brother of Gita with whom accused No.2 Jagdish used to misbehave. In our opinion,therefore, oral statements made by the deceased before the eye witnesses and other witnesses and persons are clearly proved to be truthful versions of the deceased and are,therefore,relevant under the provisions of section 32 of the Evidence Act. It would not detain us any longer in expounding the settled proposition of law that dying declaration - written or verbal- before the authority or persons made by the deceased, is succinctly spelt out to be truthful voluntary version of the deceased ; whereas, in the present case, there is coherent,clear and consistent evidence of the prosecution witnesses including three eye witnesses that the deceased did make his rational, voluntary, truthful statements.Thus, four verbal dying declarations made by the deceased immediately after occurrence of the incident are relevant and fully supporting the case of the prosecution. It is clear from the evidence that the deceased though he had sustained serious injuries on account of severe infliction of knife blow given by accused No.1, he was conscious till he was brought to the place where Holi fire was on and he was able to make rational, voluntary statements. Therefore, we have no doubt in our mind that the deceased before he succumbed to serious injuries sustained by him on account of infliction of knife blow given by accused No.1 was in a fit state of mind to make such statements. Therefore, dying declarations relied on by the prosecution are acceptable which materially corroborate the version of

the prosecution.

Again the deep seated motive ascribed by the prosecution is also proved to the hilt. It is very clear from the evidence that accused No.2 Jagdish was harassing Gita ,daughter of Martaji.He was trying to exploit Gita which was not liked by the deceased, as a result of which, he had rebuked accused No.2 Jagdish and cautioned him to desist from such indulgence. It is,therefore,the case of the prosecution that there was motive for commission of the crime. Motive is proved. Nonetheless, it is also settled proposition of law that even in absence of proof of motive, prosecution can successfully establish the guilt of the accused by leading reliable evidence. Ordinarily, motive is the main factor for commission of crime. But it is not incumbent upon the prosecution to establish in every case so as to connect the accused with culpability of his charge ,if the prosecution successfully leads reliable evidence, direct or circumstantial. It is also a clear proposition of law that even in case of proof of motive, it need not be commensurate with gravity of the offence in question. Therefore, the contention which was advanced before us that relationship or harassment at the hands of accused No.2 Jagdish to P.W.6 Gita was not that serious or grave that the accused persons will form a common intention to finish the deceased , has no merits. The ultimate anxiety of the court of law is to go in search of truth and if the truth is brought on record by the prosecution by leading clear and dependable evidence, the element of motive or its degree would pale into insignificance.

The trial court has rightly reached the conclusion that there was common intention to finish the deceased and in our opinion, this conclusion is quite weighty and justified. Section 34 of the IPC provides that when a criminal act is done by several persons and in furtherance of the common intention of all, on the vicarious aspect, each of such accused is liable for that act in the same manner as if they were done by him alone. Ofcourse,section 34 does not constitute and create a separte offence. As such, it enumerates the principle of joint liability for criminal act done in furtherance of common intention of the offenders. The conviction of the accused persons,therefore, on the basis of section 34 for the act done by one or the other person in furtherance of the common intention, is quite justified. In short, conviction of the accused persons recorded ,relying upon the principle of common intention of all and if the reason for conviction established that the accused was convicted for the offence committed in furtherance of

common intention of himself and others, the reference in order recording conviction under section 34 insofar as other persons are concerned who were parties to the common intention, can be held liable. The condition precedent to attract rigours of some offence committed by accused No.1 in inflicting knife blow on the person of the deceased,with the aid of section 34 cannot be questioned for the reason that there is nothing to show that there was common intention to commit murder of the deceased. It is not necessary for each and every person implicated in this common intention should individually give blow. Whereas, in the present case, it is succinctly established without any doubt that both the accused had called the deceased near Intwada (brickyard) , a few meters away from the Holi fire in the village on the day of the incident and there, accused No.2 held the hands of the deceased presumably rendering him helpless to counter-attack and immediately thereafter, accused No.1 Dinesh inflicted powerful blow with the knife from back of the deceased and which pierced the chamber of the heart which was the cause of death of the deceased, as per the medical evidence. This aspect speaks volumes about the common intention formed by the accused persons Otherwise also, it is safe to conclude, to prove common intention, that direct evidence was hardly obtainable. This is a matter of inference from surrounding set of facts and circumstances, the manner and mode in which the incident occurred,the type of blow inflicted by accused No.1 with the knife after accused No.2 caught hold of the deceased coupled with the animosity and deep seated motive. There cannot be any hesitation in holding that there was common intention formed by both the accused to do away with the life of any person and in furtherance of such common intention, crime was committed. Therefore, both the accused persons are equally liable for their culpability. It is proved without any doubt that accused No.1 Dinesh gave vital blow to the deceased with the help of a knife ,Muddamal article No.11 in furtherance of the common intention.Thus, there was homicidal death the author of which was nobody else other than accused No.1 Dinesh and since it was in furtherance of the common intention of both ,with the aid of provisions of section 34, accused No.2- Jagdish can be held jointly liable for the murderous act done by accused No.1.Thus, the accused persons are jointly responsible for causing homicidal death of the deceased.

A contention has been raised before us in the alternative that culpability of the accused persons will not attract the provisions of section 302 but will attract only provisions of section 304-I. Prima facie, this

submission may appear to be attractive but not acceptable in light of the factual scenario emerging from the record of the present case. We have successfully found ourselves in agreement with the trial court that there was common intention of both the accused to commit murder of the deceased initially on account of animosity. The modus operandi in commission of the capital crime of murder steals the heart of law. The accused persons had called the deceased at some distance from the place of Holi fire near Intwada (brickyard) where both the a ccused persons in furtherance of their common intention to finish the deceased succeeded in translating their common intention by causing murder of the deceased. In the facts and circumstances of the case which we have highlighted hereinabove, could it be said even for a moment that the act or the culpability established is merely culpable homicide not amounting to murder ? The positive answer would be in the negative. It is very clear from the record that the common intention of both the accused was to commit murder and it is succinctly and independently proved by the prosecution and rightly accepted by the trial court. In our opinion, the accused persons are rightly held guilty for the offence punishable under section 302 by the trial court.

Next, it brings into consideration again the aspect which not only gives great shock to us but it startles us. It is with regard to quantum of sentence imposed by the learned Additional Sessions judge. He has sentenced both the accused for ten years R.I. and fine of Rs. 200/and in default, to undergo 7 days' R.I for the offence punishable under section 302 read with section 34,IPC after observing and holding that minimum sentence awardable under section 302 is life imprisonment. It is really very unfortunate that the trial court knew well that section 302 does not admit sentencing less than imprisonment for life. After enumerating reasons, in all probabilities, being influenced by the emotion because of the fact of young age of the accused persons, there appears to be confusion out of emotion which has no role to play when minimum sentence is prescribed . No discretion is statutorily available or provided while exercising and determining the quantum of sentence in case of serious crime under section 302 wherein minimum sentence is imprisonment for life. Therefore, this aspect needs to be corrected while allowing the appeal of the State for enhancement under section 377 of the Code.

The trial court has also found accused No.1 guilty for the offence under section 135 of the Bombay Police Act and has sentenced accused No.1 Dinesh to pay fine of Rs.

100/- and in default, to undergo four days' S.I. It appears that the correct proposition of law was not brought to the notice of the trial court.Section 135 of the Bombay Police Act prescribes penalty for contravention of rule or directions under sections 37,39 or 40. It would be expedient at this stage to refer to the provisions of section 135;

"Whoever disobeys an order lawfully under section 37,39 or 40, or abets the disobedience thereof shall, on conviction, be punished-

(i) if the order disobeyed or of which the disobedience was abetted was made under sub-section (1) of section 37 or under section 39, or section 40,with imprisonment for a term which may extend to one year but except for reasons to be recorded in writing, be less than four months and shall also be liable to fine; and

(ii) if the said order was made under sub-section (2) of section 37, with imprisonment for a term which may extend to one month or with fine which may extend to one hundred rupees; and

(iii) if the said order was made under sub-section (3) of section 37,with fine which may extend to one hundred rupees."

It is very clear from the aforesaid provisions that whoever disobeys an order lawfully made under section 37,39 or 40 of the said Act is liable to punishment under section 135 (i).It becomes,therefore, clear that fine is not the only sentence permissible under section 135 (i). The trial court has relied on the notification issued by the competent and lawful authority viz. Additional District Magistrate, Sabarkantha at Himatnagar under the provisions of section 37 (1) of the said Act. It is produced at Exh. 45. In view of Id and Holi festivals during the relevant period , for maintenance of law and order,exh.45 order came to be notified by the competent authority which prohibits holding of or possessing of any one of the weapons enumerated in the notification. One of them is knife.The prosecution has successfully proved that accused No.1 Dinesh who was holding knife was guilty of violating lawful order made by the competent authority produced at Exh.45. In the circumstances, provisions of section 135 (i) will be attracted so far as sentencing is concerned. The learned Additional Sessions judge has merely sentenced accused No.1 to fine of Rs. 100/-=.In our opinion, since there is offence punishable under

section 135 (i), the accused is required to be sentenced for imprisonment and also liable to fine.In the facts and circumstances, the order of sentence recorded for the offence under section 135 (i) is modified and accused No.1 is sentenced to R.I. for four months . Order of fine remains undisturbed.

In support of appeal at the instance of the accused persons, reliance is placed firstly on the decision of the Honourable Supreme court rendered in Gulshan and others vs. State of Punjab,AIR 1988,S.C,2110.Relying on this decision, it has been submitted that this is a case for conviction and sentence under section 304-I read with section 34 and not under section 302 read with section 34. We have gone through the said decision. The few facts mentioned in paras 2 and 3 of the said judgment clearly go to show that the decision was rendered on the basis of the facts of that case. There was trade rivalry and one of the accused was also released on bail by the Honourable apex court ten years before and the person with whom there was trade rivalry came to be acquitted. In the circumstances ,conviction under section 302 read with section 34 came to be converted into one under section 304-I. It was contended before us that in that case, the age of the accused person was considered. The accused persons were below 19 years at the time of the incident. Since the accused persons before us are also of young age,attempt was made to convince us that the said case law should be followed. As we have already observed above,the factual situation in the present case is altogether different. Therefore,the said decision is not attracted in the present case.

It was also contended relying on the Honourable Apex court's decision in Sunder Singhvs, State of Rajasthan, AIR 1988 SC 2136 that the accused persons can be held guilty under section 304-I. It was contended that in that case, the accused was anold man at the time of appeal before the Honourable Supreme court and in view of the advance age of the accused,the sentence to the period already undergone was found sufficient.The said decision is also obviously not applicable to the facts of the present case. The earlier judgment is relied on,on the ground that benefit should be given to the young people whereas, the subsequent decision is relied on,on the ground that even old persons can be given benefit. We may state that age of the offender plays role only after conviction is recorded and when the court imposes sentence. In the present case, we have, without any hesitation or doubt, found that the conviction of the accused persons under section 302 read with section 34 is

amply justified and when the offenders are found guilty for the offence under section 302,the choice of sentence is circumscribed. The minimum sentence under section 302 is life imprisonment. Therefore, in our opinion, the age can play role only when we have to consider sentencing of offender. It hardly matters when we have to consider the offence itself.

The learned advocate for the appellants-accused has also relied on the decision of the Honourable Supreme court in Guljar Hussain vs . State of U.P.,AIR 1992 SC 2027. In para 4 of this decision,it is clearly observed that in view of the pleadings, no offence was established under section 302 . It is also further observed that the court has considered the proved facts. So, it was decided in the light of the facts of that case wherein intentional killing was not proved beyond doubt; whereas, in the present case, the facts situation is diametrically opposite to the proposition canvassed before us. That decision is also,therefore, of no avail .

In view of entire conspectus of testimonial collections and documentary evidence and the relevant proposition of law,we are satisfied that criminal appeal No.17 of 1993 is required to be dismissed; whereas, criminal appeal No. 20 of 1993 at the instance of the State for enhancement under section 377 of the Code is required to be allowed.

In the result, the accused persons are held guilty for offence under section 302 read with section 34 and sentenced to imprisonment for life and conviction of accused No.1 Dinesh under section 135 of the Bombay Police Act is confirmed and after hearing learned advocate for the accused, and the learned Additional Public Prosecutor, minimum sentence of four months R.I as prescribed , is awarded to accused No.1 without disturbing amount of fine awarded by the trial court.

The appeal of the State is allowed; whereas the appeal of the accused shall stand dismissed. Bails were not granted to the accused. Therefore, they will continue to serve out the enhanced sentence imposed by us. Substantive sentence in respect of accused No.1 shall run concurrently.
